IN THE

Supreme Court of the United States

October Term, 1977

No. 77-19

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor,

ARMISTEAD B. ROOD,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 2, 1977

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Armistead Buckner Rood of Washington, D.C., respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit in its docket No. 76-1370 captioned as above, which is embodied in a series of five orders entered between November 5, 1976, and February 24, 1977, inclusive.

OPINIONS BELOW

The district court did not enter an opinion. The summary memoranda and orders of the Court of Appeals were entered without a formal opinion. The order of the district court and the memoranda and orders of the Court of Appeals are all appended.

JURISDICTION

The judgment of the Court of Appeals is spread over five serial summary memoranda and orders respectively dated November 5 and December 10, 1976, and January 17, February 2, and February 24, 1977. The Court of Appeals did not pass upon all of petitioner's contentions now in question until its order of February 24, 1977, when it refused to consider his contentions of entrapment and denial of procedural due process. ("Moreover, upon review of the motion, no good reason appears . . .")

To avoid controversy over the time for a certiorari petition, the petitioner requested the Supreme Court to fix (or extend, if it were deemed an extension) the time as 90 days from February 24 until May 25, which was done by an order dated April 20. (No. A-861, Brennan, J.) By order of May 18 (Brennan, J.) the time was extended through June, 16. On June 16 the petitioner filed an application for a further extension of time through July 24, 1977. By an order of June 20 (Brennan, J.) that application was granted, without prejudice to the Court's consideration of whether the application of June 16 was filed on time. That order is appended.

Jurisdiction of the Supreme Court to review the judgment of the Court of Appeals rests on Title 28, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

In 1976 a simple order instructing the court's trustee to distribute an expense fund to the junior claimant, not mentioning the objections thereto, was entered in the district court. The petitioner, who held pending prior claims against the fund, is one of five parties who appealed. The Court of Appeals by order of November 5, 1976, dismissed petitioner's appeal summarily for lack of a substantial question, on the ground that all claims for further allowances from the fund were barred by a previous 1974 district court judgment which should have been appealed. It is not controverted that by agreement petitioner's pending claims lay in abeyance in the district court and that the supposition of a 1974 judgment on his claims had no factual basis whatsoever.

(1) Thereafter, to sustain its summary dismissal, might the Court of Appeals, after partly recanting (to allow future adjudication of some inchoate claims against the fund) persist (in its order of January 17, 1977) in summary dismissal by shifting to a second unargued ground, *viz.*, that petitioner, by not having appealed from the *lack* of a judgment ("failure to allow his allegedly pending petitions") had thereby waived his claims – in the face of Civil Rules 54(b) and 58?

(2) Upon its being shown that there was no previous order of the district court upon petitioner's claim from which he could have appealed, might the Court of Appeals then reaffirm its summary dismissal in an order of February 2, reject the pleading making that showing, and return it to petitioner, on the new stated grounds (a) that petitioner had not anticipatorily made that showing previous to the first order of the Court of Appeals (dated November 5, 1976), and (b) that no injustice was being

done – thus adhering to summary dismissal of the appeal at the threshold on considerations in which fanciful untimeliness was still a major element?

(3) Did the Court's summary dismissal adopted *sua sponte* on grounds that were new and therefore unargued, without allowing an opportunity to refute them, coupled with the Court's initial seminal error of postulating the existence of a fictitious appealable 1974 order (the error which set the series of dismissal orders in motion), amount to a deprivation of procedural due process [by requiring petitioner to disabuse the Court of Appeals of all possible misapprehensions before they could possibly come to his notice for correction], thus permitting rationalization of a disposition reached on untenable grounds?

(4) Did the Court of Appeals issue summary judgment without ascertaining what facts were established?

(5) Did the Court of Appeals, instead of setting a good example, act unaccountably and irresponsibly and beneath the standards exacted of administrative agencies upon judicial review in baring their reasoning and the ultimate bases of their dispositions?

(6) Did the procedures of the Court of Appeals satisfy minimum procedural decencies? Or did they penalize and afflict petitioner and visit forfeiture upon him for the Court's own mistakes in (a) first assuming that the appeal could be dismissed because he had not taken an appeal from an imaginary 1974 order, rather than for any blameworthy conduct on his part, (b) then assuming that he could have appealed from other orders which had not mentioned him (and to which he had no objection), and (c) then concluding that no injustice had been done by the surprising turn of events which dismissed his appeal because

he did not anticipatorily meet unforeseeable objections to his appeal before the reasoning of even the very first order of dismissal could have come to his consciousness?

CIVIL RULE 58
ENTRY OF JUDGMENT

> . . . Every judgment shall be set forth on a separate document. A judgment is effective only when entered as provided in Rule 79(a). . . .

STATEMENT OF THE CASE

The district court's jurisdiction is grounded on Section 77 of the Bankruptcy Act (11 U.S.C. 205), which reformed and codified procedures for reorganization of railroad carriers in equity. But this petition does not ask the Supreme Court to pass upon any question of railroad reorganization law.

In April, 1976, the Penn Central Transportation Company trustees transferred their railroad system generally to another railroad carrier known as Conrail. Simultaneously a Penn Central attorney asked the district court to instruct its B&P trustee to turn over the B&P reorganization expense fund to the Penn Central trustees.

Background

The Boston & Providence Railroad Corporation (B&P) has one of the new-style railroad reorganization plans that divide consummation into two stages, the first stage being sale of the debtor's transportation enterprise to another carrier. *Stage One* was accomplished for B&P on April 20, 1971. At that time the B&P expense fund in question was reserved for the payment of all allowances which the district court shall finally have adjudicated for expenses (including compensation) of

> "services heretofore or hereafter rendered . . . in connection with these proceedings or the Plan or the execution of this [consummation] order".

Subject to the priority of all such B&P allowances (in which the Interstate Commerce Commission is no longer involved) the B&P plan allocates the residue of the fund to Penn Central's trustees.

The major event in Stage One was the purchase of B&P's Boston & Providence Railroad (including accessory properties lying within the crowded modern metropolitan areas of Providence and Boston) and franchises by Penn Central's trustees as their new investment of 1971. The Boston & Providence Railroad (which now forms the east end of the so-called Northeast Corridor) had not been a part of Penn Central Transportation Company's estate in reorganization.

That 1971 purchase, however, was subject to a reserved equitable trust which petitioner had obtained for the benefit of all B&P owners, consisting of an equitable charge upon all B&P properties entitling B&P's stockholders to receive possible large proceeds of subsequent conversions of B&P real estate to modern metropolitan uses (by sale, condemnation, or lease) over a term of years.

Stage Two is the program to realize such proceeds for the B&P stockholders from that equitable trust. The trust and their interest (unless extended for extraordinary circumstances) will terminate at the end of 1978.

The B&P plan would not have been consummated without the addition of Stage Two. Originally the plan specified purchase of B&P's enterprise for a price that would allow B&P's stockholders $110 per share. Only the independent Development Group of B&P stockholders (acting

always for the benefit of all stockholders through petitioner as the Group's chief counsel) dared oppose. But the I.C.C. examiner indicated sympathy, and the Development Group obtained the addition of Stage Two, which so far has produced some $300 per share additional for the B&P stockholders from the equitable trust.

From time to time Judge Ford (B&P's late reorganization judge) issued a call for petitions for interim allowances from the estate for expenses of parties, including compensation of counsel. Such allowances hold top priority as administration claims. The latest call was made in 1971; the final call has yet to be made. Pursuant to the 1966 call petitioner filed an interim application for compensation at barebones level, explicitly reserving his right to apply later on for a supplemental allowance in the contingent event that "the success factor" (large realizations from the proposed B&P equitable trust) should materialize. He received an allowance covering 452 weeks of work spread over 12 years. The court approved the I.C.C. report finding that but for the insistence of the Development Group (acting through petitioner) the principle of the B&P equitable trust would never have come into being – but with this *caveat:*

> "The ultimate worth . . . cannot be measured at this time."

(*In Re Boston & Providence R. Corp.*, 428 F.2d 159, 162 (1970). *Boston & Providence R. Corp. Reorganization,* I.C.C. Finance Docket 12131, Examiner Clerman's Report, mimeo sheet 41 (1967). (See sheets 23-30, 41-43.)

In 1974 the district court had pending before it subsequent applications of this petitioner for allowances reflecting the success factor (as shown by 1973 payments to the

stockholders out of the equitable trust). A second expense fund was reserved temporarily, from proceeds of a large resale of B&P properties to the Commonwealth of Massachusetts. Petitioner sought to enjoin distribution of the second fund pending the settlement of his claims by negotiations with the Penn Central trustees (which seemed promising) or by adjudication. In allowing the second fund to be distributed the Court of Appeals regarded petitioner's claims as lying primarily against the basic B&P expense fund in question now. The Court recognized his claim for the delayed success factor, subject to proof. *In Re Boston & Providence R. Corp.*, 501 F.2d 545, 547-549 (1974). (Memorandum and order on rehearing, October 18, 1974.)

The district court's 1976 action

On June 24, 1976, the district court instructed its trustee to transfer the B&P expense fund to the Penn Central trustees. Its simple order did not mention the objections. Five parties appealed. The district judge stayed his instruction pending final disposition on appeal.

The shifting positions of the Court of Appeals

First position. The Penn Central trustees moved in the Court of Appeals for summary affirmance, invoking the First Circuit's Rule 12 for quick disposition of appeals that do not present a substantial question.

On November 5 the Court of Appeals promptly granted the motion, without briefs or oral argument. It overruled the contentions that there were prior pending and inchoate claims against the fund by misreading the record, saying:

> "The district court in September, 1974, directed payment of final expenses out of the debtor's

> expense fund, and that order [sic] has never been appealed. Since the time for appeal has long since passed, this issue is not properly before us."

Second position. On December 10 the Court withdrew that statement and asked the Penn Central trustees (and another party) to show why claims for services rendered after June, 1971, may not still be adjudicated. On January 17, the Court's third order reversed the district court's order. But it then went on to hold that this petitioner is barred, not for failing to appeal from a 1974 judgment on his claims – but because he had not appealed from a *lack* of a judgment adjudicating his claims.

> "Appellant Rood, having not appealed from the district court's failure to allow his allegedly pending petitions, has waived any claim to an allowance for services rendered or expenses incurred during this period."

The Court stated that its reversal of the district court was subject to a limitation that only services rendered after June, 1971, were to be considered.

Thus the Court of Appeals, in an adaptation of Zeno's Paradox, by dividing the long project into two arbitrary periods, before and after midnight June 30, 1971, so to speak, sawed the patient in two:

> Before June 30: Work done. Value deferred. Uncompensable.
>
> After June 30: Value produced. Work done previously. Uncompensable.

Petitioner then showed that there was never any adjudication of his pending petitions in the district court from which he could have appealed. *An attempted appeal would have been hooted out of court.*

True, in September, 1974, the district court had entered some orders for some allowances to some other parties, *but its only 1974 action on the pending petitions of petitioner Rood was agreed inaction.* Without objection the district court had filed a 1974 agreement of parties in the record (the Halley letter, appended) for allowances to be made to other parties while adjudication of this petitioner's claims was passed over.[1]

Petitioner showed that, in the face of Civil Rules 58 and 54(b), the district court could not possibly be deemed to have adjudicated his pending petitions in 1974 or to have terminated the proceeding (*sub silentio* or otherwise). Petitioner showed this Court's explanation of the absolute command of revised Rule 58 (as stated *supra*) quoting Professor Moore, and concluding thus:

> "But whatever may be the appropriate sanctions available in a particular case . . . we do not believe that a case-by-case tailoring of the 'separate document' provision in Rule 58 is one of them. That provision is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered.

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[1] In its third order (January 17) the Court of Appeals criticized petitioner for not having appealed from district court awards to other petitioners in September, 1974. But petitioner Rood had no reason to appeal from those allowances.

His claims were different from the others. The other petitioning lawyers attained their goal when the plan was put into effect in April, 1971. But petitioner Rood was primarily concerned with the realization that might come to the B&P stockholders through successful administration of Stage Two, *in futuro.* That has nearly quadrupled the $110 goal which only the Development Group opposed.

> We grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion."
>
> *United States v. Indrelunas*
>
> 411 U.S. 216, 229-222 (1973) (Per Curiam)

Petitioner suggested how the Court of Appeals might correct the error of its Second Position, thus:

> "An appropriate procedure now would be to issue a mandate directing entry of judgment on Mr. Rood's claims in conformity with Rule 58, either allowing or disallowing. However, appellant still maintains that the soundest solution is set forth in Appellant's Opposition to Summary Dismissal, filed October 25, 1976, pages 20-22: *referral to a special master.*"

Third position. Then the Court of Appeals shifted again. Conceding *arguendo* that his pending petitions had not been adjudicated and that petitioner could not have appealed in 1974 and therefore had not waived his claims by not then appealing, the Court then invented a new reason for summary dismissal, stated in its fourth summary order, dated February 2. The new reason was that the Court of Appeals ought to impose forfeiture on petitioner as a matter of equitable discretion. However great such forfeiture might be, it would be deemed necessarily fair because the benighted petitioner had not *anticipatorily* saved the Court from falling into the factual and legal errors of the Court's Position One and Position Two. Thus the Court (without inquiring into the extent of the injury) justified bringing petitioner and his associates to grief. Petitioner maintains his claims for the benefit of others besides himself (including creditors). The same Court of Appeals in its reported

1974 decision had identified his claims correctly as including a claim for 5 per cent of $12,000,000 (less the interim allowances on the 1966 petitions).

In reaching its Position Three the Court had to deal with the arguments of petitioner's prompt petition to reconsider the new holdings in the order of January 17. The Court accomplished that by rejecting and physically returning the pleading back to petitioner.

Fourth position. In a prompt petition to reconsider the new holdings of the fourth order (February 2) petitioner showed that the Court may not retroactively require him to plead anticipatorily the absence of a judgment barring his claims (which he had always, like the Court of Appeals in 1974, described as *pending*.) To require such anticipatory pleading would be, as the Supreme Court has said –

> "inconsistent with any known rule of pleading, so far as we are aware, and is improper."
>
> *Boston Mining Company v. Montana Ore Company*
> 188 U.S. 632, 638-639

Petitioner also argued that by springing a new bar against him late in the litigation and refusing to hear (by physically rejecting) his valid, prompt refutation, the Court of Appeals deprived him of his right to due process of law in the primary procedural sense of that term, violating the Fifth Amendment, and that to cling to such error in the face of timely correction was *entrapment* – citing *Brinckerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-681 (Brandeis, J.).

In its fifth order of February 24, the Court of Appeals dealt with the arguments on anticipatory pleading and

deprivation of procedural due process in two ways. First, it was too late because the Court's mandate had gone down to the district court instantly on February 2. (See Clerk's Letter of March 2, appended.) Secondly, considering the arguments on their merits, it held that they did not warrant altering the ultimate position of the Court.

That ultimate position is that no injustice is being done.

Throughout all its shiftings of position, ending on a cryptic bare assertion that no injustice is being done, the Court clung to its original dismissal at the threshold with respect to the claims in question (although its reversal of January 17 allowed the district court to adjudicate inchoate claims for services performed after June 30, 1971). The Court throughout refused plenary disposition and never allowed an oral appearance. Finally, the Court left its decision in such a state that it is not possible now to make out or descry what its *ratio decidendi* was, on the basis of facts in the record which are not in dispute.[2]

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[2] The Court of Appeals also persistently refused to mention other vital questions presented in the appeal, challenging the propriety of distributing the expense fund to Penn Central in view of Penn Central's breach of trust alleged to have been committed in 1976 by the trustees' selling their remaining B&P properties to another carrier without preserving the B&P equitable trust as required by the 1971 B&P consummation decree, which made them trustees for the proper administration of Stage Two for the B&P stockholders.

REASONS FOR GRANTING THE WRIT

Haste makes waste. [*Lewis v. State of New York*, 547 F.2d 24 (C.A. 2).] The First Circuit, compounding its original error by obstinate insistence on summary dismissal at any price, has produced an appellate quagmire.

Starting off on a mistaken assumption, the Court of Appeals has progressed to a termination imposing forfeiture of a right of appeal and a major claim because the petitioner had not disabused the Court of its misapprehension before its misreading of the record came to light.

After being shown its original plain error, that Court should not be allowed to reverse its course, shift its grounds, and rationalize its summary dismissal without elaboration, while dispensing with briefing and oral argument.

A thrice-reiterated summary dismissal cannot rest on shifting sands and survive retraction and abandonment of its previous major premises.

Unless that Court will render a reasoned account, it is impossible to understand its underlying premises. A court of appeals ought to lead the way and set a good example by delivering a reasoned, articulate explanation of its dismissal, by giving a *ratio decidendi* that measures up to the standards which it exacts from administrative agencies when it subjects them to judicial review.[3] Patient study herein has not deciphered the First Circuit's final *rationale*.

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[3] *Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973). *S.E.C. v. Chenery*, 332 U.S. 194, 196 (1947). *N.L.R.B. v. Wyman Gordon*, 354 U.S. 759, 767 (1969).

Summary dismissal has been abused. A court may not justify summary dismissal and persistent adherence to its first impressions[4] by vague reference to vagrant equities founded on undeveloped tenuous notions of fault and neglect. It may not gloss over a failure to specify a legally sufficient reason for summary dismissal by casually observing that no injustice is being done – for that is no more than a residual conclusion which presupposes some other solid stated ground already expressed. It is not an explanation nor a justification for nonchalance with the facts and a dismissive attitude toward the materiality of facts misunderstood. It is emphatically not a legally self-sufficient basis for summary dismissal standing by itself unamplified.

The Court of Appeals is out of order when it imputes a lack of skill in the handling of an appeal, by condemning before hearing and without first assuring itself in the time-honored, conventional, judicial way (receiving briefs and oral argument) that summary dismissal stands on firm ground. It may not persist through thick and thin to offhand conclusions long after the premises have been shot down. The Court should have made amends for its previous dismissal founded on a hasty misreading of the record, by a fresh start abjuring preconceptions. To hear before it condemns, to resist self-justification, and to maintain an open mind were imperative. But instead its series of reiterated summary dismissals on unargued bases, and its imposition of a duty on appellant to negate unforeseeable

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[4] Jacques Barzun, *Clio and the Doctors*, Univ. of Chicago Press, 1974, p. 50, qutoing from Ulric Neisser in *Science*, notes the universality of "a certain reluctance to admit error . . . characteristic of people and institutions generally."

erroneous objections to his appeal *anticipatorily*, denied him the protection of Rule 58 and deprived him of procedural due process.[5]

A court should not casually and offhandedly dismiss an appeal taken by right merely because the court has done so before, without a conscientious effort to explore or ascertain whether any alternative procedure withstanding analysis was available to petitioner and reasonably discoverable by practitioners before the court.[6]

After a court has had to acknowledge the error of its way in prematurely dismissing an appeal in consequence of its own mistake, it is unjust to penalize the victim by then requiring him to run the gauntlet and to spike unargued objections to his appeal going to its merits. It is unjust to fault him for not having met them before they were raised by the Court of Appeals initially, and then to deny him the opportunity to meet its ill-defined objections on the Catch-22 ground that he is injecting new issues. It is self-evident that opportunity to present procedural due process objections to the stumbling blocks interposed by the Court *sua sponte* is required by due process and elementary considerations of fairness.

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[5] For a court to proceed on its own in injecting new and unsifted theories without the help of counsel presents dangers.

A fortiori, if the court is impervious to reason and shakes off refutations by stating that no injustice has been done it adds a new terror to federal practice.

[6] None of the five orders addresses in any detail the question of what avenues were open to petitioner. The existence of a 1974 order appealable by him was simply assumed.

The Court of Appeals was duty-bound to resist the natural tendency to carry over a bias resulting from its original dismissal. The Court should have refrained from persisting in summary dismissal until it could formulate a reasonable conclusion not dependent on its original erroneous dismissal.

By their nature foreclosure and preclusion, when invoked to dismiss an appeal, require the specific elements to be articulated. In this case there is a conspicuous absence of a legally sufficient basis for dismissal on jurisdictional grounds taking cognizance of the actual factual background. The merits were never even canvassed. The Court should scotch the appearance of *a parti pris* rationalization and predetermined outcome by disclosing what its operative premises were after its original assumption was discredited.

It is an abuse to take shelter behind rehearing rules when the Court espouses novel theories. (Not that any of petitioner's pleadings were late under the Appellate Rules.) To deny an opportunity to subject the new theories and their supporting facts to strict scrutiny is to block correction of erroneous presuppositions and misapprehensions latent in the new *rationale*, and to the extent that the new substitute grounds are novel or undisclosed it denies procedural due process. *Brinckerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-8. *Davis v. Wechsler*, 263 U.S. 22, 24.

A court may not insulate its orders from review by trapdoors unconstitutionally denying appellant an opportunity to respond to new matter, simply by directing the clerk to return the submission as untimely (although prompt under the Appellate Rules). (*Cf.* Order of February 2, 1977,

the second sentence.) The district court had not fully disposed all claims before it. There is no fixed rule that a district court order or batch of orders presumptively ties up all loose ends and disposes *all* claims. *Civil Rules 54(b) and 58.* Yet that fallacy has plagued this case throughout its sojourn in the Court of Appeals.

Petitioner is entitled to a reasoned statement of satisfactory and legally sufficient bases for the summary dismissal. When the Court of Appeals refuses to receive as new matter argument as to appealability and consequent deprivation of due process it bars the last avenue to redress in that court, erects improper barriers against correction, and clogs the right of appeal in a manner not authorized by 28 U.S.C. 1291.[7]

The cavalier attitude of the Court of Appeals to persist in its initial impulse to dismiss notwithstanding the invalidation of its premises departs so far from acceptable procedures as to demand the supervisory action of the Supreme Court.

It is a reasonable interpretation that a sense of untimeliness and waiver by failure to take an appeal from a supposititious order of September 3, 1974, has influenced if not dominated the entire proceeding below and has been smuggled in through the back door to the very end. Certainly the Court of Appeals has not yet candidly owned up to its errors but has defensively issued variations which do

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[7] "If we are to keep our democracy there must be one commandment: Thou shalt not ration Justice." Address of Judge Learned Hand before the Legal Aid Society of New York, February 16, 1951, quoted in Marvin Comisky, *Declare an End to Judicial Quotas*, 36 Federal Bar Journal 30, 40 (Winter-Spring 1977).

not come to grips with the questions of what petitioner ought to have done and whether he could have appealed from the orders of awards on September 3, 1974, to some other parties, despite his lack of objection to those awards. (See the Hally letter appended.) He is faulted for not having disabled the anti-aircraft guns of the Court of Appeals which themselves did not reach their target (his appeal) until after the guns started firing – but up to that point he had no way of knowing that they were firing. *Lex non cogit ad impossibilia.*

The law of pleading does not require anticipation even of foreseeable objections, much less those that are flawed in their reasoning.

The actions of the Court of Appeals present such a procedural foul-up as to outrage one's sense of the decencies and proprieties. Petitioner has been euchred out of his appeal on the basis of a feeling within the Court of Appeals which it has not been able to substantiate: namely, that somehow, somewhere, there is either an impediment to the appeal or some inequity in allowing it to be maintained. But the feeling is an amorphous sentiment which has not yet been whipped into shape as the end product of judicial reasoning demonstrating that what actuates it is more than a mood or impression or desire to avoid. It does not show that due cognizance of the hard, refractory, stubborn facts in the particular case has been taken.

It will not do to shoot down appeals by following the reasoning of Dr. Fell's case, for arbitrary elimination destroys public confidence that the judiciary's performance is based on the rule of law.

CONCLUSION

Wherefore petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review its summary dismissal of petitioner's appeal, No. 76-1370.

Respectfully submitted,

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July 2, 1977

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of	)	*In Proceedings for the*
	)	*Reorganization of a*
BOSTON & PROVIDENCE	)	*Railroad*
RAILROAD	)	
CORPORATION,	)	
Debtor.	)	No. 62413

ORDER

It appearing from the quarterly report of Charles W. Bartlett, Trustee, dated December 31, 1975, and the Petition of the Trustees of the Property of the Penn Central Transportation Company, filed March 30, 1976, that it is now proper to implement the third priority of payment listed in Paragraph 12 the Plan of Reorganization of the Boston & Providence Railroad Corporation which was herein approved on November 8, 1966, due notice having been given to all parties in interest, now, upon the said petition, it is hereby

ORDERED that Charles W. Bartlett, Trustee, is directed to pay to the Trustees of the Penn Central Transportation Company, within thirty days from the entry hereof, all moneys due and owing pursuant to the aforementioned Plan of Reorganization in the amount of $385,187.04, as specified in the Trustee's quarterly report dated December 31, 1975, plus all interest that has accrued since the closing date of that report and less any necessary expenses.

June 24, 1976
Date

/s/ Andrew A. Caffrey
District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1368.

IN RE

BOSTON AND PROVIDENCE
RAILROAD CORPORATION,

DUMAINES,

No. 76-1370.

IN RE

BOSTON AND PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

MEMORANDUM AND ORDER

Entered November 5, 1976

Upon consideration of the Penn Central Trustees' Motion for Summary Disposition, and all the oppositions thereto, the court hereby grants the motions. As to the argument of the Dumaines that an unbroken prior history of reimbursement by the Penn Central is no guarantee of future performance, we can only note that such an argument does not provide any reason to believe that the Penn Central will therefore now refuse reimbursement.

As to appellant Rood and the Development Group, we note that the Interstate Commerce Commission rejected their claim for services based on the "success Factor" theory, and awarded them fees of $90,000.00. The I.C.C.'s last action, a denial after reconsideration, occurred on June 6, 1974. The district court in September, 1974, directed payment of final expenses out of the debtor's expense fund, and that order has never been appealed. Since the time for appeal has long since passed, this issue is not properly before us.

The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION

ORDER

Entered December 10, 1976

The court, in reviewing the petition for rehearing of Armistead B. Rood, notes that the district court's order of April 26, 1974, was confined to petitions for allowance of compensation for services rendered between July 1, 1966, and June 30, 1971, and that the allowances made on September 3, 1974, were similarly limited. Additionally, in

Judge Ford's order of February 23, 1971, the district court reserved jurisdiction "to make allowances of compensation for services heretofore or hereafter rendered . . . in connection with these proceedings or the Plan or the execution of this order, out of said fund of $550,000." Section V, paragraph 2. The court, therefore, may have misspoken itself, in its memorandum and order of November 5, 1976, in referring to the district court's action of September, 1974, as one which "directed payment of final expenses out of the debtor's expense fund, and that order has never been appealed."

The court therefore requests the appellees, the Trustees of the Penn Central, and the Charge Trustee, to submit, by December 23, 1976, a memorandum addressed to the following questions:

1. Where and in what manner does the record show that appellant Rood or the Development Group is foreclosed from pressing in the district court or on appeal any claim for services rendered after June 30, 1971?
2. If such claim is not foreclosed, contrary to our statement in our memorandum and order of November 5, 1976, what implications does such fact have on our affirmance of the order of the district court of June 24, 1976, directing the transfer of the moneys remaining in the debtor's expense fund to the Penn Central Trustees?
3. If the claim for post-June 30, 1971, services has not been foreclosed, what procedures exist for the consideration and adjudication of such a claim?

By the Court,
/s/ Dana H. Gallup
Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

In the Matter of
Boston and Providence Railroad Corporation,
Debtor

ON MOTION FOR RECONSIDERATION

Before Coffin, Chief Judge,
and Campbell, Circuit Judge

Entered January 17, 1977

Upon appellant Rood's Motion for Reconsideration and upon consideration of all pleadings and exhibits filed with the court, and memoranda submitted in response to the request of the court, it is ordered that the matter be remanded for the limited purposes hereinafter described.

The court is satisfied that Rood no longer has any reviewable claim for services rendered for the period July 1, 1966, to June 30, 1971. The Interstate Commerce Commission rejected his claim on February 4, 1974, 342 ICC 859, 870-873, which was then acted upon by the district court on May 17, 1974, and implemented by allowances granted on September 4, 1974. This court underscored that appellant's 1966-1971 claims were before the district court in the period between the April, 1974, call and the September, 1974, allowances. *In re Boston & Providence Railroad Corp.*, 501 F.2d 545, 548 (1st Cir. 1974). Rood proffers no reasonable basis for his having failed to appeal from the lower court's awards of September 3, 1974. Appellant Rood, having not appealed from the district court's

failure to allow his allegedly pending petitions, has waived any claim to an allowance for services rendered or expenses incurred during this period.

As to claims for the period subsequent to June 30, 1971, we may have misspoken in our order of November 5, 1976 to the extent that we indicated that no issue regarding fees or disbursements could now be raised. The district court's orders of September 3, 1974 were predicated on calls for petitions for allowances of compensation and expenses from July 1, 1966 to June 30, 1971. Nothing called to our attention indicates that claims for further allowances have been barred. While we are by no means sure that any valid claims exist, we deem it important that an opportunity be afforded for their presentation. We therefore grant the petition for rehearing and amend our order of November 5, 1976 only to the extent that we remand to the district court the matter of determining whether any parties are entitled to compensation for services rendered and expenses incurred subsequent to June 30, 1971, and, if so, in what amounts.

By the Court,

/s/ Dana H. Gallup
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370.

IN RE
BOSTON & PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

MEMORANDUM AND ORDER
Entered February 2, 1977

In his last two Motions for Reconsideration, appellant Rood argued that there was no final order from which he could appeal entered by the district court in September, 1974, and that his objections to that court's approval of the I.C.C. orders is therefore still pending. Since this argument was presented in neither his Motion to Stay filed on August 6, 1976, nor in his Opposition to the Motion for Summary Dismissal, dated October 25, 1976, and since no satisfactory explanation is proffered, the motion for rehearing is returned, pursuant to our local rule 15. Moreover, we would add that in the circumstances narrated in our order of January 17, 1977, there is no injustice imposed on an appellant who did not raise this argument before the district court at all, and who first raises it before us on a motion for reconsideration.

It is further ordered that mandate issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

IN RE

BOSTON & PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

ORDER OF COURT

Entered February 24, 1977

The petition for reconsideration of the order of February 2, 1977, dated February 14, 1977, is hereby denied as being untimely as mandate had issues; moreover, upon review of the motion, no good reason appears why mandate should be recalled.

By the Court:

/s/ Dana H. Gallup
Clerk.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANA H. GALLUP
CLERK

1606 JOHN W. McCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MASS. 02109
(617) 223-2065

March 2, 1977

Armistead B. Rood, Esquire
3520 Thirty-Fifth St., N.W.
Washington, D.C. 20016

Re: No. 76-1370. In Re: Boston & Providence Railroad Corp., etc.

Dear Mr. Rood:

In reply to your letter dated February 26, 1977 received today, you will recall that the last paragraph of the February 2 Memorandum and Order provided:

"It is further ordered that mandate issue forthwith."

In accordance with that order, the mandate was issued forthwith, i.e. on February 2, 1977.

Sincerely yours,

Dana H. Gallup
Clerk.

DHG:lac

Supreme Court of the United States

No. A-861

IN RE BOSTON & PROVIDENCE RAILROAD CORPORATION,

Debtor

ARMISTEAD B. ROOD,

Petitioner

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, FURTHER extended to and including July 24, 19 77, without prejudice to the Court's consideration of whether this application has been filed in time.

/s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 20 day of June, 19 77.

NUTTER, McCLENNEN & FISH

75 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110

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DELIVER
June 19, 1974
0294-06

The Honorable Andrew A. Caffrey
United States District Court
U.S. Postoffice and Courthouse
Boston, Massachusetts 02109

Re: Boston & Providence Railroad Corporation,
Debtor - In Proceedings for the Reorganization
of a Railroad - No. 62,413

Dear Judge Caffrey:

In connection with the Motion of Armistead B. Rood for Continuance of Proceedings Scheduled for June 21, 1974 (which we understand the Court has acted on by continuing the proceedings until July 22, 1974), the undersigned and Laurence M. Channing of Hill & Barlow, had telephone conversations on June 18, 1974 with Charles R. Nesson, Esquire, Mr. Rood's attorney, concerning the possible effect of the Motion on the status of the fee applications in the above proceeding of Hill & Barlow, this firm (and Palmer & Dodge). This letter is to confirm for the record Mr. Nesson's statement of position on that subject: Mr. Nesson stated, in substance, that allowance of Mr. Rood's particular Motion was not intended to delay the action of the Court in passing on and settling the fee applications of these three firms; and, specifically, that Mr. Rood does not object to the entry of final orders by the Court on such fee applications.

Respectfully,

John R. Hally

JRH:sp

Copies to all counsel
(as per attached certificate of service)